No. 11089

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration, *Appellant*,

vs.

JAMES HENRY PACKING COMPANY, a Corporation, *Appellee*.

JAMES HENRY PACKING COMPANY, a Corporation, *Cross-Appellant*,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, *Cross-Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF JAMES HENRY PACKING COMPANY
Appellee and Cross-Appellant

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THE ARGUS PRESS, SEATTLE

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BRIEF OF JAMES HENRY PACKING COMPANY

Appellee and Cross-Appellant

STATEMENT OF PLEADINGS
And
FACTS DISCLOSING JURISDICTION

For convenience, James Henry Packing Company, defendant in the District Court, and appellee and cross-appellant herein, will hereafter be referred to as the cross-appellant.

On February 29, 1944, Chester Bowles, Administrator of the Office of Price Administration, on behalf of

The United States of America, commenced an action in the District Court of The United States for the Western District of Washington, Northern Division, against the cross-appellant under the provisions of Section 205(e) of the Emergency Price Control Act of 1942, alleging a violation by the cross-appellant of Maximum Price Regulation No. 169 as amended, relating to beef and veal, by an overcharge to purchasers at wholesale of carcasses and cuts of beef and veal to the amount of $19,149.64, asking judgment for treble the amount of the alleged overcharge (Tr. 2). Issue was joined (Tr. 11), and on January 19, 1945, judgment was awarded against the cross-appellant in the sum of $21,826.89 (Tr. 35).

Jurisdiction was conferred on the District Court by Sections 205(c) and 205(e) of the Emergency Price Control Act of 1942 (56 Stat. 23—Title 50 U.S. C.A. App. 904(a)). During the pendency of the action in the District Court, said Section 205(e) was amended by Section 108(b) of the Stabilization Extension Act of 1944 (58 Stat. 632—Title 50 U.S.C.A. App. 901). By Subsection (d) the amendment was made applicable to pending proceedings.

Jurisdiction of the Circuit Court of Appeals to review the judgment on appeal is found in Section 128 of the Judicial Code as amended (43 Stat. 936—Title 28 U.S.C.A. App. 225(a)).

STATEMENT OF THE CASE

Cross-appellant is, and during the year 1943 and prior thereto was, a meat packing company in Seattle, Washington, with approximately 100 employees (Tr. 13 and 74). During the month of July 1943, and for sometime prior thereto, there was a scarcity of processed meats and meat products in and around Seattle, and many retail meat markets suspended business (Tr. 14). During the year 1943 maximum prices on carcasses and wholesale cuts of beef and veal were fixed by regulations of the Office of Price Administration (Tr. 2), but no price ceilings were established on livestock (Tr. 148). It was not possible to buy livestock on the market and process it except at a loss (Tr. 86).

Among the operators of retail markets in Seattle who were customers of cross-appellant were the 25 individuals called lessors in Exhibit 'A' attached to the complaint, who, because of their inability to secure meat and meat products, requested cross-appellant to take over their markets (Tr. 114). Sixteen of the 25 markets involved also handled groceries in the same premises (Tr. 132). Eight of said lessors owned the premises in which their markets were located, and the remainder were lessees (Tr. 21).

Between July first and July 22, 1943, inclusive, the 25 individuals named in Exhibit 'A' of the complaint executed one-year leases of their meat markets to cross-appellant, and each lessor, at the time of executing the lease, entered into a contract with cross-appellant to operate and manage the respective markets for cross-appellant (Tr. 15). The same form of lease and

the same form of contract of employment were used in all cases.

The rentals reserved in the leases were the reasonable rental values of the markets (Tr. 134). The compensation of the managers was a percentage of gross receipts (Tr. 20). Following the execution of the leases and contracts of employment, cross-appellant, in writing, instructed each of its managers to carefully observe price ceilings in making purchases and sales and also to comply with the rules and regulations of the Economic Stabilization Director with reference to wages and salaries paid employees (Exhibit A-1; Tr. 76).

Cross-appellant also furnished each manager with a printed form on which to report daily sales (Defendant's Exhibit A-2; Tr. 79), and ordered signs four feet long and eighteen inches wide, bearing the words "James Henry Market No. .....," to be installed on the front of each market (Tr. 79).

Following the execution of the lease and the contract, cross-appellant delivered to the respective markets beef, lamb and pork in wholesale cuts, and ham, bacon and lard (Tr. 14), and rendered invoices similar in form to those used prior to the leasing, but identical to the form used in billing merchandise to a retail market on Western Avenue which was owned outright by cross-appellant (Tr. 129).

A form of lease and a form of contract of employment had been drafted by counsel for cross-appellant prior to July 1, 1943, and were submitted to the local office of the Office of Price Administration, and criti-

cized because of a cancellation provision upon thirty days' notice (Tr. 139).

The documents were redrafted, eliminating the cancellation clause, and again submitted to the local office of the Office of Price Administration. The 25 leases and contracts involved were then negotiated.

On July 30th the District Price Attorney of the local Office of Price Administration wrote cross-appellant a letter stating that, in the opinion of the local office, the leasing arrangements were forbidden evasions of Revised Maximum Regulation 169, and that he would be glad to discuss the matter further at the convenience of cross-appellant (Plaintiff's Exhibit 1; Tr. 122).

A copy of the letter, Plaintiff's Exhibit 1, was mailed to the attorney for cross-appellant, who promptly answered, informing the Chief Attorney of the local Office of Price Administration that Mr. Joseph, the President and Manager of the cross-appellant, was in Canada on vacation, and that "as soon as he returns, we will get in touch with your office for the suggested conference" (Defendant's Exhibit A-9; Tr. 146).

Upon his return from Canada, Mr. Joseph was at his home, ill, for two or three weeks (Tr. 121), and no other officer of cross-appellant was familiar with the matter (Tr. 153). On August 23d counsel for cross-appellant wrote the Chief Attorney that he had just secured a copy of the clarifying amendment referred to in the letter of July 30th (Plaintiff's Exhibit 1), which required retail markets to be wholly owned by the processor supplying the meat, expressing his

opinion that the leased markets were wholly owned by cross-appellant and asking for an interpretation of the amendment. The letter also states: "If the Price Administrator should take the position that the leases are an evasion, then we must, of course, request our lessors to agree to a mutual cancellation" (Defendant's Exhibit A-10; Tr. 147).

One week later, August 30th, the Litigation Attorney of the local Office of Price Administration wrote cross-appellant that, in his view, the leases and contracts constituted an evasion of the price ceiling regulation and concluded with the following paragraph: "A reasonable time will be allowed to effectuate termination before we proceed with legal action. We shall expect, however, to be kept advised of the progress in bringing about rescissions."

This letter from the Litigation Attorney was promptly acknowledged by cross-appellant (Defendant's Exhibit A-4; Tr. 89), stating that the letter was being referred to legal counsel requesting advice and instructions on how to proceed to accomplish cancellation of the leases and contracts.

Cross-appellant handled no veal (Tr. 59). Beef constituted 57% of all meats delivered to the markets, and no records were kept by the markets of the percentage of beef to total sales at retail, but it was estimated and agreed by and between the market managers and cross-appellant that beef sales at retail approximated 30% of total sales except in two instances, where the percentage was slightly more (Tr. 21).

On September 24th cross-appellant wrote each of

its managers a letter (Defendant's Exhibit A-5; Tr. 91) advising them that, in the opinion of the local attorneys for the Office of Price Administration, the contracts of employment were an evasion of Price Regulation 169 as amended, and that it would thereafter relinquish to the managers all interest in receipts from sales of beef and veal furnished by cross-appellant. A copy of this letter to managers was sent to the Litigation Attorney of the Office of Price Administration with the information that cross-appellant would protest the interpretation of the regulation by the local office and appeal therefrom.

On October 4th the Litigation Attorney wrote cross-appellant a letter, reading:

> "With reference to your letter of September 24th transmitting to us a copy of a form letter addressed to persons operating retail outlets under your direction, will you be good enough to inform us whether the deductions from the sales of meat products other than beef and veal mentioned in your form letter are still being made by these markets." (Defendant's Exhibit A-6; Tr. 94)

On October 11th cross-appellant answered the letter of the Litigation Attorney, advising him that no change had been made in the leases other than to comply with his interpretation of the price regulation as expressed in his letter of August 30th (Defendant's Exhibit A-7; Tr. 96).

On November second, cross-appellant wrote each of its market managers that the Office of Price Administration viewed the leases and contracts as not sanctioned by Government price regulations, and re-

quested that they agree to a mutual cancellation as of November first (Defendant's Exhibit A-8; Tr. 98).

This letter followed a conference with the officials of the Office of Price Administration, at which it was apparent that they would not approve the leases and contracts, notwithstanding the deductions of beef sales (Tr. 151).

Although none of the lessors had yet agreed to a cancellation, cross-appellant treated the leases and contracts as cancelled as of November 1, 1943 (Tr. 16). After securing from cross-appellant a detailed statement of net receipts from the operation of the markets (Tr. 5, 6, 7, 8, 9 and 10), and three months after cross-appellant ceased operating the markets, the Office of Price Administration filed this suit upon the theory that deliveries of beef to said markets were, in fact, sales to the market managers, and that such net receipts were, therefore, overcharges and an evasion of Price Regulation 169 (Tr. 2).

SPECIFICATION OF ERRORS

I.

The District Court erred in its Finding of Fact IV. that cross-appellant failed and neglected to take any steps to terminate said leases and contracts until September 23, 1943.

II.

The District Court erred in its Finding of Fact IV. that cross-appellant collected $19,149.64 in excess of selling price.

III.

The District Court erred in its Finding of Fact IV. that said leases and contracts were mutually cancelled by the parties thereto.

IV.

The District Court erred in its Finding of Fact V. that cross-appellant did not pay any retail sales tax on sales made by said stores, nor file any return of sales tax or business tax due the State of Washington from said stores.

V.

The District Court erred in its Finding of Fact V. that the amount of monthly rental fixed in the leases was an arbitrary sum.

VI.

The District Court erred in its Findings of Fact V. that cross-appellant never gave instructions to said markets as to management or books and records of account to be kept, and never authorized any of the obligations incurred by said markets.

VII.

The District Court erred in its Finding of Fact V.

that the operation, management and control of said markets continued in every way without change after the execution of said leases or contracts, except that said markets were required to pay cross-appellant a percentage of their gross sales in addition to the payment of ceiling prices.

VIII.

The District Court erred in its Finding of Fact VI. that said leases and contracts were and are evasions of Maximum Price Regulation 169.

IX.

The District Court erred in its Finding of Fact VII. that the gross sales of said stores in 1942 exceeded $500,000.00.

X.

The District Court erred in its Finding of Fact VIII. that cross-appellant received any excess over ceiling prices fixed by Maximum Price Regulation 169.

XI.

The District Court erred in its Findings of Fact VIII. that up to September 15, 1943, was a reasonable time allowed cross-appellant to cancel said leases and contracts.

XII.

The District Court erred in its Finding of Fact VIII. that failure to cancel said leases and contracts by September 15, 1943, was an unreasonable delay, and that collections in excess of Maximum Price Regulation 169 were done knowingly by cross-appellant and the result of its failure to take practicable precautions against the occurrence of a violation of said Price Regulation.

XIII.

The District Court erred in its Finding of Fact IX. that cross-appellant should be required to pay the Administrator on behalf of The United States the total sum of $21,726.89 and costs of suit.

XIV.

The District Court erred in making its Conclusion of Law I., that the leases and contracts referred to in the Findings were made for the purpose of securing a higher price for beef than permitted by Price Regulation 169 and were and are forbidden evasions of said Regulations.

XV.

The District Court erred in its Conclusion of Law I., that cross-appellant's failure to cancel said leases and contracts by September 15, 1943, was an unreasonable delay, and that Maximum Price Regulation 169 was knowingly evaded by cross-appellant, and that cross-appellant failed to take practicable precautions against the occurrence of Maximum Price Regulation 169.

XVI.

The District Court erred in its Conclusion of Law II., that the Administrator was entitled to judgment against the cross-appellant.

XVII.

The District Court erred in its Conclusion of Law II., in awarding judgment for the total receipts of cross-appellant from the operation of said markets, when only 57% of the meats delivered to said markets was beef.

XVIII.

The District Court erred in its Conclusion of Law II., in awarding judgment for one and one-half times the receipts from said markets for the period beginning September 15th and ending November 8, 1943.

Cross-appellant relies upon each and every Specification of Error, as each specification is germane to the issues. The Specifications of Error raise two principal question:

First:Were there any *sales* of beef at wholesale upon which said Emergency Price Control Act and Price Regulation 169 could operate?

Second:If the operation of the retail markets by cross-appellant was a violation of the law and the regulation, was such violation wilful or the result of failure of cross-appellant to take practicable precautions against the occurrence of the violations?

SUMMARY OF ARGUMENT

1. Cross-appellant did not fail and neglect to take steps to terminate the leases and contracts until September 24, 1943, as found by the Trial Court, but at all times expressed its willingness and intent to secure a mutual resicission if it should be determined that the leases and contracts were forbidden.

2. Cross-appellant collected no money in excess of wholesale ceiling prices, as it sold no beef at wholesale.

3. The leases and contracts were legal and binding upon the parties and could not be cancelled by cross-appellant, but required the mutual consent of the parties.

4. Contrary to the Finding of the Trial Court, each market paid all sales tax and all business taxes due the State of Washington.

5. The monthly rental reserved in the leases was the rental value of the leased premises, and it constituted an expense of operation which would have been refunded to cross-appellant if actually paid.

6. From the date of the execution of the respective leases and contracts of employment, the markets were operated under the exclusive control and supervision of cross-appellant, and the respective managers were fully instructed as to duties and responsibilities.

7. Contrary to the Finding of the trial court, the markets did not continue to operate without change after the execution of the leases and contract, as the management and control then passed to cross-appellant, who assumed all of the duties and liabilities of

ownership and operated the markets through its employee-managers, who were paid a percentage of profits.

8. The leases and contracts were not forbidden evasions of Maximum Price Regulation 169 and were legal and binding upon the parties, and cross-appellant sold no merchandise whatsoever to said markets, but only at retail ceiling prices to the public through said markets.

9. The evidence does not support the Finding of the trial court that the gross sales of the stocks in 1942 exceed $500,000.00, and such Finding has no relation to the issues in the case.

10. Cross-appellant received no money whatsoever in excess of ceilings fixed by Maximum Price Regulations 169.

11. The Finding of the trial court that cross-appellant should have cancelled the leases and contracts by September 15, 1943, was clearly erroneous and the date arbitrary. The evidence and the exhibits demonstrate cross-appellant's intention to seek a mutual cancellation as soon as it could be determined that the Office of Price Administration would not approve the operation of the markets by cross-appellant.

12. Cross-appellant took every practicable precaution against violating the regulation and was not responsible for any unreasonable delay in relinquishing the markets, but actually forced the issue upon lessors and managers when the local Office of Price Administration definitely disapproved.

13. The sole issue in the suit was an alleged viola-

tion of wholesale price ceilings on beef. No other meats or merchandise are involved. Had cross-appellant handled no beef, as it handled no veal, there would have been no lawsuit. There could have been no lawsuit under Price Regulation 169. When cross-appellant relinquished its percentage of the proceeds from beef on September 24, 1943, there was no further evasion under any possible construction of the law and the regulation.

14. Inasmuch as the Regulation and the suit relate exclusively to beef, it was obviously wrong to award judgment against cross-appellant for proceeds of all meats delivered, when 43% of the total was pork, lamb, ham, bacon and lard.

15. The trial court disregarded the sanctity of the contracts, and wrongfully assumed that the leases and the contracts could be forthwith terminated at the will of the cross-appellant.

16. The beneficent objects and purposes of the Price Control Act were defeated by the Office of Price Administration in its interference with cross-appellant's acquisition and operation of the retail markets.

ARGUMENT

There is not a word of evidence that the leases and contracts were not what they purported to be. It is a universally recognized principle of law that a contract fixes the rights and liabilities of the parties, and no assumptions or presumptions will be indulged in contrary to the evident purpose and intent of the contract; and a contract is to be construed as seeking to effect a legal rather than an illegal object.

Upon the execution of the two documents, cross-

appellant became the lessee in possession, and the second party to the contract of employment became the employee of cross-appellant. It will not be denied that cross-appellant could own and operate retail meat markets without offending any law or any regulation of the Office of Price Administration. It had owned and operated one for many years (Tr. 77).

When cross-appellant executed the leases, it assumed full liability for rental to the owners of the buildings in which the markets were located in those cases where the lessors were tenants. It assumed liability for any loss of merchandise contained in the markets by fire, flood or other casualty. It assumed liability for injuries to third persons. If a number of people had been poisoned by meat, poultry or fish purchased at the market, can there be any doubt about the liability of James Henry Packing Company? Cross-appellant assumed liability for all obligations incurred by the managers of the market, including the cost of all merchandise purchased for resale. It assumed liability for losses from uncollectible accounts. It assumed liability for loss or damage resulting from theft or robbery of the markets. It was charged with all of the liabilities and responsibilities of an owner of the market, which, in fact, it was.

No beef was sold to the individual managers. If there is a sale, title must pass. Title to the beef delivered to the markets never left cross-appellant until it was sold to the public at retail. The invoices sent to the markets with deliveries of beef were obviously for accounting purposes. The managers had no individual obligation to pay them. It would have been

absurd for the Packing Company to base a claim against the individual manager on the invoice. The production of the contract of employment would promptly defeat the claim.

The Packing Company and its manager were never in the relation of creditor and debtor, the manager's only obligation being to account to its employer for *all* receipts of the market. The money that went into the till of the market belonged to cross-appellant and not to the manager, and cross-appellant paid the manager out of such receipts his percentage of the profits. If the market cash register or safe had been robbed, it would have been cross-appellant's loss.

In now following somewhat the order of the Specifications of Error and Summary of Argument, clarity will require some repetition of the facts and circumstances set forth in the Statement of the Case.

1. Cross-appellant did not fail and neglect to take steps to terminate the leases and contracts.

The form of the lease and contract of employment had been submitted to Judge Hartson, the Chief Attorney for the Office of Price Administration, before any were executed. Judge Hartson approved the lease (Tr. 152 and 162) and not until the Sholley letter of July 30th (Plaintiff's Exhibit 1; Tr. 122) was received by counsel for cross-appellant was counsel informed that the documents had been referred to San Francisco for an opinion as to whether they offended the regulations or not, nor was the fact known to cross-appellant until Mr. Joseph's recovery from his illness in the latter part of August (Tr. 146).

In his letter Mr. Sholley said, "We referred copies of these documents to our San Francisco office for their opinion," but failed to state that the Regional office in San Francisco advised him that "each case must be decided on its own facts," and that it was "very dangerous to look at the draft of a document and say whether or not the transaction is valid" (Tr. 180).

Notwithstanding this caution from the Regional office, Mr. Sholley, in his letter of July 30th, rendered his personal decision that the leases were forbidden as an evasion pursuant to his interpretation of a general advice from the national office that "any arrangement which falls short of a complete transfer of ownership and operation of a retail outlet to the wholesaler must be deemed to be forbidden." He stated that "a clarifying amendment will soon be issued," and invited a further discussion with cross-appellant and counsel.

No further word was received from the Price Administration Office, but on August 23d counsel for cross-appellant secured a copy of the "clarifying amendment" and promptly wrote Judge Hartson with reference thereto (Defendant's Exhibit A-10; Tr. 147). In this letter counsel for cross-appellant stoutly maintained that the leases were not inhibited by the amendment and not an evasion, but stated:

> "If the Price Administrator should take the position that the leases were an evasion, then we must, of course, request our lessors to agree to a mutual cancellation."

It will thus be seen that even at this early stage of the proceedings, cross-appellant manifested and expressed its intent to abide by the ruling of the Office of Price Administration.

Counsel's letter was patently for the purpose of securing definite advice from the Office of Price Administration. It was the further discussion suggested in Mr. Sholley's letter. It specifically requested an interpretation of the amendment, but the Office of Price Administration did not see fit to reply, notwithstanding the testimony of Mr. Sholley that "my duties primarily are the furnishing of regulations and interpretations of various Maximum Price Regulations to other members of our staff and to the *members of the general public*" (Tr. 175).

Cross-appellant very naturally assumed that Judge Hartson and associates had accepted its counsel's interpretation as expressed in his letter of August 23d (Tr. 147), but one week later cross-appellant received a letter from the Litigation Attorney stating that, in his opinion, the lease-employment arrangement constituted an evasion of ceilings fixed in Price Regulation 169. He added that a reasonable time would be allowed cross-appellant to terminate the leases (Tr. 87).

Cross-appellant promptly answered the letter, stating that it was being referred to legal counsel for instructions on how to proceed to accomplish a cancellation of the leases and contracts (Defendant's Exhibit A-4; Tr. 89). While we look in vain in the transcript for some evidence of the activities of cross-appellant during the ensuing three weeks, the infer-

ence is plain that cross-appellant was not successful in accomplishing mutual cancellations.

"These people (the lessors) were all satisfied with their leases, were doing better, and did not want to cancel" (Tr. 158). From the general import of the testimony of cross-appellant's witnesses, it is apparent that cross-appellant and its counsel were perplexed by the attitude of the Price Administration Office. It had approved similar leases (Tr. 164). The arrangement was beneficial to all concerned, but the Litigation Attorney refused to be satisfied.

Cross-appellant and its counsel then reached the conclusion that inasmuch as the objection from the Price Administration Office was based on Regulation 169, which related exclusively to beef (and veal), if beef were eliminated in calculating the profit percentage of cross-appellant, there would be no further objection (Tr. 150).

Cross-appellant then wrote the letter of September 24th to each of its managers advising them: "In reporting receipts for the purpose of determining your commissions, omit or deduct all receipts from sales of beef and veal furnished by us."

A copy of this letter was at the same time mailed to the Litigation Attorney, with a letter stating that, "Pending our protest and appeal of the Regulation and your interpretation, we are relinquishing all profits from retail sales of beef and veal furnished by us, and are instructing our managers accordingly."

Thereafter the managers' earnings were augmented by the profit on beef furnished by cross-appellant (Tr. 21). This concession to the opinion or whim of the

Litigation Attorney should have satisfied any reasonable mind.

Subsequent to September 24th, there was no beef involved in the arrangement, so far as cross-appellant was concerned. Apparently the letter and enclosure of September 24th did not reach the Price Attorneys. At least cross-appellant was not given the benefit of their reaction to the elimination of beef (Judge Hartson had resigned and left the office (Tr. 160)), as on October 4th the Litigation Attorney, who, we assume from his title, was concerned only with litigation, wrote cross-appellant the following cryptic letter:

> "With reference to your letter of September 24, transmitting to us a copy of a form letter addressed to persons operating retail outlets under your direction, will you be good enough to inform us whether the deductions from the sales of meat products other than beef and veal, mentioned in your form letter, are still being made by these markets." (Defendant's Exhibit A-6; Tr. 94).

The Litigation Attorney's letter was indirect, but on October 11th, cross-appellant acknowledged the letter and answered what it interpreted to be the litigation attorney's question, stating that, "We have made no changes in our leases of retail meat markets other than to comply with your interpretation of the amendment to Maximum Price Regulation 169, as expressed in your letter of August 30, 1943."

This was the last communication from the Office of Price Administration, and on November second, following a conference at which counsel for cross-appellant was advised definitely that the deduction on beef

sales would not satisfy the Litigation Attorney (Tr. 151), cross-appellant wrote a letter to all of its managers, asking them to agree to a mutual cancellation of the leases and contracts of employment as of November 1, 1943 (Defendant's Exhibit A-8; Tr. 98). Cross-appellant discontinued its operations of the markets as of that date. The Litigation Attorney filed his suit three months later.

It is respectfully submitted that cross-appellant manifestly at all times was willing to accomplish a mutual cancellation of the leases and agreements upon definite advices from the Office of Price Administration.

2. Cross-appellant collected no money in excess of wholesale prices, as it sold no beef at wholesale.

Neither party to the leases and agreements, no creditor of either party, no taxing authority — in fact, no one except an administrative agency exceeding its purposes and powers — would contend that cross-appellant sold beef to its managers. The markets belonged to cross-appellant. The managers were in the employ of cross-appellant on a percentage basis.

The managers acquired no title to the beef and had no obligation to pay cross-appellant for the beef other than their responsibility to account to their employer. There were no sales and the Emergency Price Control Act and Price Regulation 169 issued thereunder had no application.

3. The leases and contracts could not be cancelled by cross-appellant, but only with the consent of the other parties.

Both the Office of Price Administration and the trial court condemned cross-appellant for not breaching its contracts. Although he declared the lease and contract free from fault (Tr. 195), the trial court assumed that cross-appellant had the right to cancel them. The trial court read into the documents the very condition which was deleted from the originals because of the criticism of Judge Hartson and Mr. Sholley.

The testimony clearly shows that at all times cross-appellant was aware of its legal responsibilities to its lessors and managers, even though such responsibilities were disregarded by the Office of Price Administration. The summary disposition of the leases and contracts by the Office of Price Administration and the trial court is difficult to reconcile with the sanctity of contract. If the leases and contracts constitute an offense against the Emergency Price Control Act, the lessors and managers were equally guilty with cross-appellant; and if at any stage of the proceedings the Office of Price Administration had given the parties a definite interpretation of the regulations and ordered leases and contracts abrogated, it no doubt would have been done and could have been done without either party incurring liability to the other for a breach of contract.

Instead, the Office of Price Administration refused to commit itself other than eventually to order cross-appellant to cancel its contracts, disregarding the rights and interests of the lessors and managers.

4. State sales tax and business taxes due from the markets were paid.

In its Finding of Fact V., the trial court found

> "that defendant neither during the life of said leases and contracts, nor at any time, paid or provided for the payment of any social security account for the alleged manager or other employees of said stores nor made any inquiry concerning same. That defendant neither during the life of said leases and contracts nor at any time filed any applications with the State of Washington for any license to operate said stores or any of them, as required by the laws of the State of Washington, nor did it pay any retail sales tax on any sales made by said stores nor make or file any returns showing any sales tax or business tax due said state from said stores as provided by the laws of the State of Washington."

Section 8370-4 of Remington's Revised Statutes of Washington (Laws of 1939, Chapter 225, Section 1, page 976) levies a business tax of one-fourth of one per cent upon sales at retail, to be paid by the seller; and Section 8370-16 of Remington's Revised Statutes of Washington (Laws of 1941, Chapter 76, Section 2) levies a tax of three per cent of the selling price on retail sales, to be paid by the purchaser, but collected by the seller. Retailers are required by the Act to make bi-monthly returns and remittance, and every retailer is required to register with the State Tax Commission (Laws of 1935, Chapter 180, Section 187).

The trial court was mislead by counsel for the plaintiff in a confusing cross-examination and made an

erroneous finding that these taxes had not been paid. These taxes were paid by the managers of cross-appellant and charged to expense of operation, as provided in the contract of employment (Tr. 155).

A business and occupation tax of one-tenth of one per cent—otherwise similar to the state business and occupation tax—was also levied on retailers under Seattle Ordinance Number 72630, effective July 4, 1943, and payable bi-monthly beginning August 31, 1943. This tax was of necessity also paid for cross-appellant by the market managers as an expense of operation.

Whether the returns were made in the name of cross-appellant or in the name of the respective markets is not apparent from the testimony, but is immaterial in any event, as the leases reserved to cross-appellant, the right at its election, to operate the markets under their former names (Tr. 18).

It would be superfluous to argue the fact of payment of these business and sales taxes. The facilities of the taxing authorities are so established that no one is permitted to escape payment. It is true that cross-appellant had not yet reported the names of its managers in its Social Security and Unemployment Compensation returns.

The names of the managers should perhaps have been included in the returns for these taxes filed September 15, 1943, for the bi-monthly period of July and August, but the period of employment of the managers was less than two months, as the contracts were made during the month of July. Counsel for cross-appellant had called attention to the neces-

sity of including the employees, but it was overlooked (Tr. 155). The returns for the bi-monthly period of September and October were not due until November 15th, before which time cross-appellant had ceased to operate the markets. Legal formalities incidental to the leasing of the markets to cross-appellant which were neglected should be charged to counsel and not to cross-appellant, and it is submitted that the matters pointed out by the trial court in Finding of Fact V. are either erroneous or too trivial to be of any persuasive force to the contention that the leases were not bona fide.

5. The monthly rental reserved in each lease was not an arbitrary amount.

In each lease cross-appellant agreed to pay a reasonable monthly rental to the lessor, who, in each case, became market manager. The amount of the rent was not actually paid by cross-appellant to lessors. It would have been but an idle gesture, inasmuch as the contract of employment required that all expenses of operation be deducted before managers' commissions were paid. The amount of the rent would have been refunded to cross-appellant had it been actually paid (Tr. 100). However, if the manager had been replaced for breach of duty or other cause, the rent would be due and payable to the lessor, as he would be no longer accountable for the expenses of operation under the terms of the contract of employment. The contention of counsel for the plaintiff that the failure of cross-appellant to actually deliver a check for the rent cast a cloud upon the lease is without merit. Rent was an expense of operation no different from

the cost of the telephone, heat and light. These expenses of operation were not paid by the manager. They were paid by cross-appellant. The money in the market till belonged to cross-appellant, not the manager; and if cross-appellant had sent a check for the rent, it would have at the same time reimbursed itself the amount before paying the manager his percentage of profits. It would seem unnecessary to labor the point further, but even if the rental reserved in the leases was the nominal sum of $1.00—which it could well have been, in view of the fact that the premises were of no value to the lessor and former owner of the market, who had no meat to sell — such nominal rental would not have affected the validity of the lease.

6-7. The markets were actually operated and under the exclusive control of cross-appellant.

Following the execution of the lease and contracts of employment, cross-appellant was in exclusive possession of the markets and operated them. The former owners were there only in the capacity of an employee. The contract of employment (Exhibit B; Tr. 19) fully defines the duties of the manager. Upon the conclusion of the 25 leases, cross-appellant instructed all managers in writing with reference to Government regulations (Defendant's Exhibit A-1; Tr. 76) and furnished all managers with forms for making daily sales reports and ordered large signs made for each market, identifying it as the property of James Henry Packing Company (Tr. 79). That the officers of cross-appellant were well aware of its

ownership of the markets and the liabilities thereby assumed is too plain for argument.

Mr. Joseph, the president and general manager, and an experienced business executive (Tr. 73), was also acting under advice of counsel. He covered the markets with liability insurance (Tr. 85). The contention that cross-appellant was not the actual operator of the markets is entirely without merit, and the trial court's finding that the operation, management and control of said 25 markets continued in every way without change after the execution of said leases and contracts as before (Tr. 31), finds no support in the evidence.

8. The leases and contracts were not forbidden evasions of Maximum Price Regulation 169.

No contention has been made that cross-appellant could not legally own retail meat markets. These markets were wholly owned and operated by cross-appellant. There is nothing in the instruments themselves, and there is nothing in the evidence suggesting invalidity. The leases and contracts were absolute and exactly what they purported to be in form and in fact.

In his oral decision the trial court said:

> "If these two instruments, which are called the lease and the contract of employment, were effective instruments for what they purported to be, then I do not believe there was a violation. The terminology of the lease and of the contract of employment is not at fault."

and then proceeded to hold them invalid upon the theory that they did not bind the parties.

9. The trial court erroneously admitted in evidence copies of Maximum Price Regulations 355 and 336 relating to the classification of stores (Tr. 176).

These exhibits and the testimony with reference thereto are irrelevant and immaterial, and, in any event, the court's Finding of Fact VII., as to the amount of gross sales of the 25 markets in the year 1942, was clearly erroneous. The only testimony adduced on this point was the cross-examination of Mr. Joseph, who repeatedly stated that he had no knowledge and no means of knowing what such gross sales were (Tr. 166).

10. Cross-appellant received no money in excess of ceilings fixed by Price Regulation 169.

From the inception of the case, the Office of Price Administration proceeded upon the erroneous theory that the Packing Company was being paid money by the markets, and the trial court adopted this fallacy. As has been pointed out, every dollar received from sales at retail *belonged* to cross-appellant, and every pound of merchandise in the markets belonged to cross-appellant until sold to the public at retail.

11-12-13. Penalty would be excessive.

We are reluctant to expand this brief. It already approaches prolixity, but we now come to that act of the trial court, which, if not corrected by this court, will impose upon cross-appellant a burden so grievous as to be entirely out of line with the nature of the transaction.

The controlling statute is Section 108(b) of the Stabilization Extension Act of 1944 (58 Stat. 632; Title 50 U.S.C.A., App. 901) amending Subsection (e)

of Section 205 of the Emergency Price Control Act of 1942. After fixing liability for violations of price ceilings at not more than three times the amount of overcharge, there is a proviso:

> "That such amount shall be the amount of the overcharge or overcharges or $25.00, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation."

The penalty imposed upon cross-appellant by the trial court for the term beginning September 15, 1943, and ending November 8, 1943, brought upon cross-appellant a far heavier penalty, of which both court and counsel were unaware at the time.

During the time involved in this case, cross-appellant and many other packing companies were and still are able to operate only by the grace of Government subsidies. Cross-appellant was receiving subsidies on beef processed under authority of Executive Order Number 9250 (7 F.R. 7871) as amended by Executive Order Number 9381 (8 F.R. 13083), which subsidies were being paid by the Defense Supplies Corporation upon claim duly filed by cross-appellant in the amount of subsidies allowable for a given term on the quantity of livestock processed.

Section 7003.10, of Livestock Slaughter Payments Regulation Number 3, Revised, of Defense Supplies Corporation provides that:

> "Defense Supplies Corporation shall have the right to declare invalid, in whole or in part, any claim which does not meet the requirements of

this regulation, and any claim filed by an applicant who, in the judgment of the War Food Administrator or the Price Administrator, has wilfully violated any regulation of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat."

Section 7003.9 of the same regulation reads:

"Preliminary approval and payment of claims shall not constitute final acceptance of the validity or amount of the claim. On a finding that the claim is invalid or defective, Defense Supplies Corporation shall have the right to require restitution of any payment or any part thereof. Any sums found to be due to Defense Supplies Corporation shall be deductible against any accrued or subsequent claim for any payment by Defense Supplies Corporation to the person."

NOTE: By amendments to Livestock Slaughter Payments Regulation Number 3 Revised, effective July 1, 1945, "Reconstruction Finance Corporation" was substituted for "Defense Supplies Corporation," and "Secretary of Agriculture" was substituted for "War Food Administrator."

Section 2, amending Section 3(b) of Directive 55 of the Economic Stabilization Director (10 F.R. 6595), reads as follows:

"Upon *nisi prius* determination in a civil action or proceeding (including a proceeding before a hearing commissioner) against an applicant for payment, that such applicant has violated any substantive provision of an Office of Price Administration meat or livestock regulation or order, the Office of Price Administration shall

certify the determination to the Secretary of Agriculture, including the period of time during which the violation is found to have occurred. The Secretary of Agriculture shall thereupon withhold payment on all claims of the applicant under this directive for the accounting period in which the violation is found to have occurred. In the event that the determination of violation shall be reversed and such reversal becomes final, the amount of subsidy withheld pursuant to this paragraph shall be paid forthwith. For the purposes of this section, every provision of the regulation or order shall be deemed substantive in nature unless the Office of Price Administration determines otherwise."

Directive 55 was issued July 1, 1945, and amended July 13, 1945. Should it be held retroactive, cross-appellant could be held to a refund of all subsidies received from July to October, 1943, inclusive, approximating $55,363.03, and not less than $24,-413.46, the subsidies received from September 15th to November 1, 1943, if the decision of the trial court that the evasion was wilful during that period is not reversed.

In his oral decision (Tr. 192) the trial court, in commenting upon the government's voluntary dismissal of the indictments returned against Mr. Joseph, said:

"It is enough to say that the evidence introduced in the case at bar, would, in the judgment of the court, not have sustained that degree of wilful and unlawful violation of the Act to have supported a criminal prosecution or conviction, but that is quite another matter from

passing upon the question as to whether or not there was this civil violation." (Tr. 195)

In his decision the court further said:

"This defendant, with advice of able counsel, gave thought and consideration to the regulation without an intent to violate it, but with a desire to comply with it." (Tr. 196)

and

"I do not hesitate to find as a fact, there was neither a wilful violation nor was such violation the result of a failure to take practical precautions against the occurrence of a violation during the month of July." (Tr. 200)

The court also found no wilful violation or failure to take practicable precautions during the month of August (Tr. 201), and, upon being reminded by counsel that the letter of August 30th (Defendant's Exhibit A-3; Tr. 87) allowed a reasonable time in which to effect termination of the leases and contracts, he exonerated cross-appellant from a wilful violation or failure to take practicable precautions for the first half of the month of September upon the theory that cross-appellant should have and could have terminated the leases and contracts within that time.

An analysis of the trial court's decision that cross-appellant wilfully violated the regulation during the final six weeks of the operation prompty discloses its error. There were then 23 stores being operated by cross-appellant, each under a formal lease for one year, with no privilege of cancellation, and each by a manager employed under a formal contract for a term of one year. Each party of the second part, upon the eve of failure in business, was given lucrative em-

ployment by cross-appellant. Each consummated a lease of his property to cross-appellant with all the formalities of any legal contract. The leases and contracts were not unilateral. An attempted cancellation by one party would constitute a breach, even subjecting such a party to damages.

It has been shown that these men did not want their leases cancelled and their employment terminated. The patent error of the trial court was the assumption that cross-appellant could cancel these contracts and that cross-appellant should have cancelled these contracts upon the interpretation of a law by an employee of an administrative agency whose interpretation was no more binding upon a court than the interpretation of cross-appellant.

Cross-appellant was never given the benefit of an interpretation by the Chief Attorney or his assistant. On September 24th, in deference to the interpretation of the Litigation Attorney, cross-appellant relinquished all profits on beef, which resulted in increasing the commissions of its managers. It is earnestly submitted that from that time on the leases and contracts bore no relation whatsoever to Maximum Price Regulation 169 dealing only with beef. The result was the same as if no beef had been handled, as in the case of veal. Wherein lies the wilfulness or the failure of cross-appellant to take practicable precautions?

The trial court found that cross-appellant was trying to obey and not violate the regulation. He credited cross-appellant with good faith in the transaction up to the time when he assumed that cross-appellant could

do that which it was not permitted to do without breaching its own contract.

The word "wilful" was construed by the Supreme Court in *Felton v. United States*, 96 U.S. 699, 702, in the following language:

> "To do or omit doing a thing knowingly and wilfully implies not only a knowledge of the thing but a determination with a bad intent to do it or omit doing it. 'The word wilfully,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes means not merely voluntary but with a bad purpose.' "

If entering into a legal contract which kept 25 meat markets from closing and enabled it to distribute graded and inspected meats to the public at retail ceiling prices, benefitting all and injuring no one was a bad purpose, then cross-appellant wilfully violated the regulation.

The imposition of the penalty was clearly wrong.

14. The judgment, if any, should have been for only 57% of the profits made by cross-appellant.

The parties stipulated (Tr. 21) only 57% of the profits made by cross-appellant were derived from beef. It was clearly erroneous for the trial court to punish cross-appellant for handling pork, lamb, ham, bacon and lard in a suit involving only a beef regulation.

15. The trial court disregarded the leases and contracts.

To enable it to apply its interpretation of an administrative regulation and after finding the leases and contracts free from ambiguities, the court set them aside upon a collateral attack and in an action

to which the lessors and employee-managers were not a party.

16. It was the act of the Office of Price Administration and not that of cross-appellant that defeated the objects and purposes of the price control law.

While the principal objective of the Emergency Price Control Act was to prevent inflation, other objects and purposes stated in the preamble include preventing hardships to persons engaged in business and assisting in adequate production of commodities.

In *Brown v. Mars*, 135 F. (2d) 843, at page 848, the court said:

> "The prime purpose of the Act is to prevent undue inflation in commodities and services during the War, and in *Yakus v. United States*, 64 S. Ct. 680, the higher court echoed the opinion of the Circuit Court in saying:
>
> " 'The purposes of the Act specified in Section 1 denote the objectives to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences.' "

In overruling the Price Administrator's contention that the distribution of dividends to members of a cooperative dairy association, which also sold milk and cream to the public, was a violation of price ceilings, District Judge Schwellenbach said:

> "In the final analysis the control at the point of the *price to the ultimate consumer* is the only one which can directly serve to prevent inflation. The amount of money which goes into circulation as the result of the production and distribution

of a product depends exclusively upon that *final price.*"

Bowles v. Inland Empire Dairy Association, 53 F. Supp. 210, page 218.

In *Hecht Company v. Bowles*, 84 Supreme Court Reporter 587, all courts were admonished to exercise their discretion in the light of the large objectives of the Act, namely, the war against inflation. The leasing of these retail markets by cross-appellant provided a legitimate channel for the distribution of inspected beef to the public without adding one penny of cost to the public. Its open and legal distribution of inspected meat to the public to some extent reduced the operations of the black markets, thereby assisting the Government in accomplishing the prime purpose of the law—the prevention of inflation.

While we are content to present the facts and ask this court to apply the law, it may be helpful to point out that our exhaustive search for parallel cases has proved almost futile. The fact that there are no other such cases is significant, for we venture the assumption that there were similar market operations in other jurisdictions as there were in this jurisdiction.

However, in the cases of *Bowles, Administrator, v. Kraft Cheese Company* (Wisconsin, unreported), Judge Stone of the District Court for the Western District of Wisconsin, in a similar action by the Administrator involving leases of small dairies and contracts employing the former owners as managers, and similar to the leases and contracts involved in this case except that they were subject to cancellation on one month's notice, held the leases and contracts

bona fide and not a violation of wholesale price ceilings on dairy products (Civil Action Number 679 decided September 1, 1944).

We conclude with the observation that artificial control of prices of commodities is repugnant to the American conception of free trade and enterprise, even unconstitutional; that even war does not abrogate freedom of contract, but in any event, cross-appellant did not violate, but contributed to the enforcement of the Emergency Price Control Act and Regulation 169, benefitting the retail market operator, itself, and the general public and injuring no one.

The judgment of the District Court should be reversed.

Respectfully submitted,

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